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No. 90-26

IN THE

SUPREME COURT OF THE UNITED STATES

October Term , 1990

MICHAEL BARNES, PROSECUTING ATTORNEY OF ST. JOSEPH COUNTY, INDIANA; LINLEY E. PEARSON, ATTORNEY GENERAL OF INDIANA; CIVIL CITY OF SOUTH BEND; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

V.

GLEN THEATRE, INC. et al. and DARLENE MILLER, et al.,

Respondents

BRIEF OF AMERICAN FAMILY ASSOCIATION, INC., NATIONAL FAMILY LEGAL FOUNDATION, INC., CHILDREN'S LEGAL FOUNDATION, INC., ELENA BOWMAN, LOU ANN HILL, SALLY BEARD, AND BRENDA GILL, AMICI CURIAE, IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Consent of the Parties

American Family Association, Inc. (AFA); National Family Legal Foundation, Inc. (NFLF); Children's Legal Foundation, Inc. (CLF); Ms. Elena Bowman, Vice-President, St. Joseph County Commission on the Status of Women; Ms. Lou Ann Hill, Secretary, St. Joseph County Commission on the Status of Women; Ms. Sally Beard, Treasurer, St. Joseph County Commission on the Status of Women; and Brenda Gill, have received consent of the parties to the filing of this Brief Amici Curiae.[1]

American Family Association, Inc.'s Interest

AFA is a nonprofit organization incorporated in 1977 under its original name of National Federation for Decency, Inc. AFA operates as a leader of citizen and church participation to promote traditional American values and apply the Biblical ethic in society. AFA has supporters in all 50 states; has over 600 chapters of local citizens who are active in seeking to preserve community integrity through the implementation of public decency laws and has over 420,000 individuals and churches who are subscribers to its monthly newsletter, AFA Journal.

AFA is consistently asked by local governments and law enforcement officers for advice and guidance on methods of regulating nude dancing establishments. AFA chapters actively seek to preserve the integrity of their local communities through the regulation of such businesses. The effective use of public decency statutes to preserve traditional values is a method which is used by local chapters in this effort.

The ability of AFA to continue to call for the enforcement of such laws is contingent upon a finding that a state may impose sanctions upon individuals appearing nude in public in this

[1] Counsel of record to the parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

manner. AFA and the citizens that it represents, would be severely harmed if the decision of the United States Court of Appeals for the Seventh Circuit was permitted to stand.

Interest of Elena Bowman's, Lou Ann Hill's and Sally Beard's Interest

Ms. Elena Bowman, Vice-President; Ms. Lou Ann Hill, Secretary; and Ms. Sally Beard, Treasurer; are members and officers of the St. Joseph County Commission on the Status of Women. They are participating in their individual capacities and as citizens and residents of St. Joseph County, Indiana. Each has advocated a position and worked to promote an enhanced quality of life for women in St. Joseph County. Through these efforts each has sought the enforcement of public decency laws in St. Joseph County.

The efforts they have engaged in will be severely impaired if the ruling of the Seventh Circuit is permitted to stand.

National Family Legal Foundation, Inc.'s Interest

NFLF is a nonprofit organization that was created in 1990 under the laws of the state of Arizona to address the enforcement of obscenity and public decency laws throughout the country. Its stated purposes are to reduce the harms of pornography to the general public; to assist law enforcement officers and other elected officials implement pornography-related laws; and to protect the innocence, physical and mental safety of children in the United States.

The efforts that NFLF has begun will be seriously affected if the ruling of the Seventh Circuit is permitted to stand.

Children's Legal Foundation, Inc.'s Interest

CLF was formed in 1957 as Citizens for Decent Literature, Inc., later renamed Citizens for Decency through Law, Inc., to provide a means for lawyers to assist prosecutors and police in enforcing and defending obscenity laws, to assist public officials improve and adopt constitutional statutes and ordinances, and to assist local citizens and community leaders understand the role of the law and legal system in dealing with the social issue of pornography and sexual exploitation.

CLF has affiliated chapters, all across the country, of independent citizens who wish to share in the experience of its staff. Such chapters and other citizen groups maintain their own structure and local objectives, but are advised by CLF of the legal precedent in their home states and other jurisdictions. CLF maintains that the law can deal effectively with criminal abuses of prostitution, live sexual commercialization and obscenity.

The efforts of CLF will be greatly impaired if the decision of the Seventh Circuit is permitted to stand.

Brenda Gill

Ms. Brenda Gill is a resident and citizen of St. Joseph County, Indiana, and has been victimized by the use of sexually explicit materials. Since the time of her victimization she has taken a public stand advocating the enforcement of pornography-related laws and has called for protection of women who are exploited in the sex industry.

Indiana has sought to protect its citizens and their community environments through the prohibition against public nudity. Consequently, all *Amici* will support the position of the Attorney General of the State of Indiana regarding the constitutional application of public decency laws to nude dancing.

SUMMARY OF ARGUMENT

This Court has traditionally afforded nude dancing few first amendment protections. The Seventh Circuit has disregarded these precedents and has extended prior Supreme Court case law beyond the bounds of the logical implications of those decisions.

The type of barroom nude movement that is found in the Kitty Kat Lounge and other similar establishments is not the type of conduct that is entitled to the protection of the first amendment. In addition, any speech elements that are attendant to the nude dancing are purely commercial in nature and are afforded minimal constitutional protection.

The Seventh Circuit's decision would elevate nude dancing to a place that few activities within the State of Indiana enjoy. It would, in many circumstances, place nude dancing beyond the legitimate control of the State.

LAW AND ARGUMENT

I. NUDE DANCING IS NOT AN ACTIVITY THAT IS PROTECTED AS SPEECH WITHIN THE MEANING OF THE FIRST AMENDMENT

A. Public Nudity is Conduct Clearly Outside the Bounds of Consideration of First Amendment "Speech" Protection

> Over thirty years ago, Justice Douglas predicted "[n]o one would suggest that the First Amendment permits nudity in public places." Roth v United States, 354 U.S. 476, 512, 77 S.Ct. 1304, 1323, 1 L.Ed. 2d 1498 (1957) (Douglas, J., dissenting). This case presents the precise question Justice Douglas regarded as beyond suggestion: Whether, and if so, where, when and how the Constitution compels the government to allow nudity in public.

Craft v Hodel, 683 F.Supp. 289, 290 (D. Mass. 1988).

Recently, there have been repeated attempts to draw public nudity within the confines of constitutional protection. Many of these attempts have come from nudists and the organizations they support. Nudists consistently maintain that their nudity is expressive and thus should be afforded protection under the first amendment. The several courts that have addressed the question of nudity as expression have all concluded that public nudity is conduct and is not protected by the first amendment. "All these cases indicate that mere nudity, while not obscene, is also not expressive in the sense that nudity might be in a play or work of art." *South Florida Free Beaches v City of Miami*, 548 F.Supp. 53 (S.D. Fla. 1982). "Although nudity is not in itself obscene, Erznoznik, 422 U.S. 205, 213, 95 S.Ct.

2268, 45 L.Ed. 2d 125 (1975), neither is it communicative." *Chapin v Town of Southampton*, 457 F.Supp. 1170 (E.D. N.Y. 1978). Even the activity of nude sunbathing engaged in by individuals subscribing to the tenets of nudism has been found to lack constitutional protection. *South Florida Free Beaches v City of Miami*, 734 F.2d 608 (11th Cir. 1984).

In *Naturist Society, Inc. v Fillyaw*, 736 F.Supp. 1103, 1111 (S.D. Fla. 1990), the court rejected the contention that nudity by the nudists was expression entitled to first amendment protection and stated, "Even if plaintiffs intend to advocate a clothing option al lifestyle by appearing on the beach in G-strings, pasties, and socks, the court finds, as a matter of law, that there is not a *great* likelihood that other beach patrons would understand this message. Indeed, because of the *de minimis* amount of clothing to be worn, the court is hard pressed to find any expression at stake other than promotion of the nude body."

Nudity is conduct and is not entitled to first amendment protection because "nudity alone conveys no specific content to whatever message is communicated." *Craft* , 683 F.Supp. at 292. The courts have recognized that only when nudity is accompanied by "some mode of expression which itself is entitled to first amendment protection." is it afforded any constitutional protection. *Chapin* , 457 F.Supp. at 1174.

The majority of states have joined Indiana in prohibiting the conduct of appearing nude in public.[2] In fact some states

[2] *See*, ALA CODE sec. 13A-12-130 (1990); ALASKA STAT. sec. 11.41.460 (1989); ARIZ. REV. STAT. ANN. sec. 13-1402 (1989); ARK. STAT. ANN. sec. 5-14-112 (1990); CAL. PENAL CODE sec. 314 (1990); COLO. REV. STAT. sec. 18-7-301 (1990); CONN. GEN. STAT. ANN.sec. 53a-186 (1990); DEL CODE ANN. tit. 11, sec. 1340 (1990); FLA. STAT. ANN. sec. 800.03 (1990); GA. CODE ANN. sec. 16-6-8 (1990); ILL. REV. STAT. ch. 38 sec. 11-9 (1990); IOWA CODE ANN. sec. 728.5 (1990); KY. REV. STAT. sec. 570.150 (1990); ME. REV. STAT. ANN. sec. 851 (1990); MD. CRM. LAW CODE ANN. sec. 335A (1989); MICH. COMP. LAWS ANN. sec. 750.335a (1990); MINN. STAT. ANN. sec. 617.23 (1990); MONT. CODE ANN. sec. 45-5-5-4 (1989); NEB. REV. STAT. sec. 28-806 (1990); N.H. REV. STAT. ANN. sec. 645.3 (1990); N.M. STAT. ANN. sec. 30-9-14 (1990); N.C. GEN. STAT. sec. 14-190.9 (1990); OHIO REV. CODE

have expressly recognized the history of the regulation of public nudity.[3] The conduct of public nudity has not and does not currently enjoy constitutional protection anymore than any other conduct an individual may engage in.

It is also important to understand the full import of the "nude dancing" establishments. Such businesses, particularly those that do not sell alcoholic beverages on site are growing in number across the country with their sole purpose being to avoid State alcohol beverage control laws. The types of activities and the dangers associated with the business are still present since patrons consume alcohol that has been purchased elsewhere.[4] The application of public decency laws to the performers is a reasonable and necessary method to address these attempts to thwart the law.

ANN. sec. 2907.09 (Page 1990); OR. REV. STAT. sec. 163.465 (1990); PA. STAT. ANN. tit. 18 sec. 5901 (Purdon 1990); S.D. COMP. LAWS ANN. sec. 22-24-1 (1990); TENN. CODE ANN. sec. 39-13-511 (1990); VA. CODE sec. 18.2-387 (1990); WASH. REV. CODE ANN. sec. 9A.88.010 (1990); W.VA. CODE sec. 61-8B-10 (1990); WYO. STAT. sec. 6-4-2-1 (1990).

[3] In the Legislative Commentary accompanying the text of the statute in Illinois outlined the historical context of public indecency laws.

> Since Sir Charles Sidley in 1663 reeled drunkenly onto his balcony to expose his nude body ton assemblage in Covent Garden below, the common law has recognized indecent exposure as a public nuisance and a misdemeanor. (LeRoy v Sidley, 82 Eng. Reprint 1036 (1663)). Because the offense developed as a "public nuisance" , the nice distinction of the common law evolved around the publicity attaching to the event. (Rex v Drumden, 170 Eng. Reprint 1091 (1809) — exposure of nude body incident to disrobing for bathing at a beach within public view held to constitute a nuisance.
>
> ILL. REV. STAT. ch. 38, sec. 11-9.

[4] Rep. Bobby Raymond, D-Phoenix, said he sponsored the bill [aimed at closing down night clubs that allow customers to bring their own liquor as they watch nude dancers] after receiving complaints about the Great Alaskan Bush Company, which is in his district. Raymond said the Bush Company and several similar nightspots in west Phoenix have created, 'a dangerous situation' by taking advantage of a loophole in the law." UPI (Mar. 10, 1988).

B. The Activity Constituting "Nude Dancing" Does Not Contain Any of the Elements of Historically Recognized Dance That Would Entitle It to Constitutional Protection

The Seventh Circuit in *Miller v Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990), went to great lengths to extol the virtues of nude dancing in terms of the dance artform that it represents. The court began by noting that "dance has bee defined as the *art* of moving the body in a rhythmically way, usually to music, to express an emotion or idea, to narrate a story, or simply to take delight in the movement itself." 904 F.2d at 1085 (emphasis added). The court went on to state, "nude barroom dancing, though lacking in *artistic* value, and expressing ideas and emotions different from those of more mainstream dances, communicates them, to some degree, nonetheless." 904 F.2d 1087 (emphasis added). The court initially uses the definition of dance as an "art" form and after analysis of the subject presentation concludes that it lacks "artistic" value. If some artistic merit is an inherent element of dance, then the presentations at the Kitty Kat Lounge are something other than dance since they lack such artistic quality.

The dance that has impliedly received first amendment protection had a measure of artistic quality that is lacking in the barroom movement found in the Kitty Kat Lounge. The activity is nothing more than a woman who is paid to disrobe in a public establishment while music is being played in the background. There is no storyline or artistic form. The dancers are not attempting to make any kind of emotional or political statement. At best, the performers are attempting to titillate or arouse the patrons.

The video tape recording of the two dancers depicts each dancer performing to two songs. The first dancer is on a runway, fully clothed, with the song, "Matter of Trust", recorded by Billy Joel, playing in the background. During the course of the song, the performer raises her skirt to reveal string bikini underwear.

She remains fully clothed during the playing of the entire song. During the second song, "You Give Love a Bad Name", by Bon Jovi, she removes her dress. She continually moves about on the runway during the playing of the song. The second performer depicted on the video tape recording also appears fully clothed throughout the first song, "Count Your Blessings", by Dionne Warwick. Toward the end of the song she removes her dress and continues the performance clad in a one-piece swimsuit. During the playing of the second song, a recording by the Bee Gees, the performer removes her swimsuit. She continues the movement with the music in the background until the song is complete. There is no discernible choreography to illustrate either the mood, music or lyrics of the songs.

This should be contrasted with the suggested comparable ballet pieces that are solely constituted and created for the purpose of interpreting a musical score of illustrating a specified emotion. It is the artistic quality that places dance in a protected category and separates it from other movement that is not entitled to first amendment protection. The artistic quality referenced in these works is synonymous with communicative expression of discernible thought. The absence of such a quality results in nothing more than random movement for hire and patronization of the voyeuristic interests of the customers.

This Court recently addressed the argument that dance as expressive conduct or speech should be afforded constitutional protection. In *Dallas v Stanglin* , 490 U.S. _____, 104 L.Ed. 2d 18, 25-26 (1989), this Court stated that, "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street, or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." It is obvious and settled within the law that the conduct alleged to be expressive must be something more than mere random movement.

The proper analysis of conduct as a communicative activity was outlined in *Spence v Washington*, 418 U.S. 405,

410-11 (1974). The Court stated that in order to enjoy first amendment protection the actor must intend "to convey a particularized message... and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." The message must be something beyond the mere exploitation or advertisement of the performer's nude body. Consequently, it is this two-part analysis that must be applied to the activity of nude dancing in determining whether it is a communicative activity.

The first part of the analysis requires a determination of whether the actor "intended to convey a particularized message." In response to this inquiry the Seventh Circuit found, contrary to the conclusions of the district court, that the "dominant theme communicated here by the dancers is an emotional one; it is one of eroticism and sensuality." 904 F.2d at 1086-87. There is nothing in the record that would support a finding that the dancers either individually or collectively intended to convey "a particularized message."

The dancers, as shown in the video tape accompanying the record in this case, conduct their movements to prerecorded popular music and remove their clothing after a period of time. There is no apparent theme from their movement except an attempt to appeal to the prurient and voyeuristic interests of the patrons.

In a concurring opinion, Judge Posner, suggests that it is the music that forms the basis for the protection afforded nude dancing. *Miller*, 904 F.2d at 1096. The music, however, to which the women move are songs by Billy Joel, Bon Jovi, Dionne Warwick and The Bee Gees. There has been no suggestion found in the record that the messages contained in the lyrics or music of the songs were used to convey a particular message evoked by the performers. The basis for using the songs were used to convey a particular message evoked by the performers. The basis for using the songs appears to be nothing more than, in the terms of American Bandstand participants, "it had a good beat and was easy to dance to."

The movement accompanying the songs did nothing to complement or personify the lyrics or music of the material. The songs did nothing more than provide rhythmic noise within which the women could move and accomplish their purpose of disrobing for the leering looks and the voyeuristic interests of the patrons.

The movement is not even a classic "striptease" in the sense that the audience is tantalized through the seduction of the actor as she removes her clothing slowly. The removal of the clothing is relative abrupt and does not follow any particular suggestion or movement by the actor.

A reasonable viewing of the performances leaves one "hard pressed to find any expression at stake other than promotion of the nude body." *Fillyaw*, 736 F.Supp. at 1111.

The court in *Crownover v Musick*, 9 Cal. 3d 405, 425-26, 509 P.2d 497, 107 Cal. Rptr. 681 (1973), described the essence and context of nude dancing when it stated, "Unless we wish to blind ourselves to what is happening in big cities with their 'topless' and 'bottomless' bars and 'nude live acts' in a tawdry atmosphere that blights the neighborhood if not the entire community, it is common knowledge that such conduct is nothing more than a sales gimmick. It is delusive to speculate in the face of these realities that the entertainment in this milieu will acquire protectable communicative properties by exposure of the genitals, pubic area or female breasts of the performers." The objective of the dancers is to entice the patrons to purchase beverages or food from the Lounge and in many instances to entice the patrons to engage in acts of prostitution outside the confines of the business establishment.

The second level of analysis requires a determination of whether there is "a great likelihood that the message would be understood by those perceiving it." *Spence*, 418 U.S. at 411. As the opinions of the district court and that of the various judges of the Seventh Circuit reveal, there is no consistent understanding of the message the actors were attempting to convey. The fact that individuals pay to view the dances, contrary to the belief of

the Seventh Circuit, does not lend support for the conclusion that the viewer understands the expression underlying the movement. *See, Miller*, 904 F.2d at 1087.

This premise is clearly false for two reasons. First, as a practical matter, since the money is paid in advance by the customer, he is obviously not paying for the message that he has received from the performance that he witnessed thereafter. Secondly, the patron of a "nude dancing" establishment is present and has paid money purely to witness lewd or sexually provocative presentations. A patron of a "nude dancing" establishment is drawn to and held by the performances out of a sense of curiosity and prurient interest. It would be ludicrous to suggest that the patron of a Dance of Seven Veils or Les Ballets Africains de Keita Fodeba is drawn to them for the same reason that a man goes to watch the activity at a "nude dancing" establishment.

The activity combines two distinct elements. The first is nudity. Women appear naked simply for the sake of the nudity itself. The second is movement under the guise of dance. Women are paid money to appear on a public platform and remove their clothing in a seductive, erotic or provocative manner. The movement does not involve any specific choreography and does not involve any plot other than to result in the nudity of the actor and in the arousal of the males in the audience. This movement no more involves expression than does the movement by the proverbial "dirty old man" in the park opening his trench coat to expose himself to passersby.

C. The Combination of Nudity With Movement in a Barroom Setting Is Not Speech Entitled to Protection Under the First Amendment

Since nudity is not communicative, then in the analysis of nude dancing as speech within the first amendment, requires that the dance be protected form of speech. As stated previously, the movement that accompanies the music and provides the

means by which the women finally appear nude is not dance as that term has been historically understood.

In fact, this Court has discussed certain distinctions in the forms of communication that would serve to support the State's inherent ability to prohibit nude barroom dancing under the public indecency statute. In *Miller v California*, 413 U.S. 15, 26 n.8 (1973), the Court stated that "States have a greater power to regulate nonverbal, physical conduct than to suppress oral or written descriptions or depictions of the same behavior." While this conduct may be permitted to be distributed in, nonobscene, recorded form, the fact that it is a live performance renders it more susceptible to state regulation. In addition, this Court in *Paris Adult Theatre I v Slaton*, 413 U.S. 49, 60 (1973), *citing*, *Jacobellis v Ohio*, 378 U.S. 184, 199 (1964) (Warren C.J., dissenting) stated, "there is a 'right of the Nation of the States to maintain a decent society . . . .,'."

These limitations serve to place the activities of the women performing at the Kitty Kat Lounge in a more restrictive light than had they merely been presented on film at the local theater. The ability to limit the activities are based both on the State's right to maintain a decent society and its right to treat live nude performances differently than it does those that are presented by way of film.

D. The Previous Decisions By This Court Addressing the Subject of Nude Dancing Have Not Granted It Constitutional Protection

The Supreme Court decisions relied upon by the Seventh Circuit for the proposition that when nudity and movement are combined that the activity suddenly becomes cloaked in first amendment protection have been misapplied.

In *California v LaRue*, 409 U.S. 109 (1972), the Court found that the regulation of nude dancing in establishments that served alcohol was within the powers of state granted under the twenty-first amendment. In *LaRue*, the Court found that "some

of the performances to which these regulations address themselves are within the limits of constitutional protection." 409 U.S. at 118. This Court did not, however, elaborate or give examples of the type of dances that would fall within the protected category.

In *Doran v Salem Inn*, 422 U.S. 922 (1974), the Court was faced with the regulation of "topless" dancing establishments. The Court upheld the granting of the preliminary injunction based upon its statements in *LaRue* that "this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances." 422 U.S. at 932.

The third case, *Schad v Mt. Ephraim*, 452 U.S. 61 (1981), involved a facial challenge to a zoning ordinance that prohibited all "live entertainment." The Court found that the regulation was not supported by any evidence of incompatibility with surrounding uses or problems with parking or trash associated with the business. The Court again stated that "Nude dancing is not without its First Amendment protections from official regulations." 452 U.S. at 66.

While the Seventh Circuit relies on these cases to support its conclusion that the State is without power to prohibit public nudity in the form of barroom dancing, a contrary conclusion is more reasonable. In fact, these three cases are wholly consistent with more recent decision, cited previously, addressing the issue of communicative expression.

The Court was fully aware of its decisions concerning communicative expression as protected speech. *See, Spence v Washington*, 418 U.S. 405 (1974). With this awareness the Court consistently has held that *some* types of nude dancing would be afforded constitutional protection. As the foregoing analysis illustrates, however, the subject barroom type of movement in the nude was not of the type that was contemplated as falling within this protective web.

Nude dancing, in order to be afforded constitutional protection, must be communicative in nature. There must be

something more than the "erotic" or "sensual" message that is being conveyed. As with other cases in which this Court has recognized protection for communicative conduct, nude dancing must convey a "particularized messages . . . [with a great] likelihood . . . that the message would be understood by those who viewed it."

II. ANY SPEECH ASPECTS THAT ARE ASSOCIATED WITH NUDE DANCING ARE COMMERCIAL IN NATURE ONLY

The movement and music attendant to the exhibition of nude women is done only for commercial purposes. Specifically, the women are paid to encourage and entice patrons to buy drinks or to pay to view more of the performance. The women do not present a specific message through the performance and the patrons are expected only to spend money either on the presentation or on the beverages available in the Lounge.

The courts have consistently held that pure commercial speech, that is advertising, may be afforded less first amendment protection than other forms of speech.[5]

In *Bigelow v Virginia*, 421 U.S. 809 (1975), the Supreme Court addressed the question of whether commercial speech was protected under the first amendment. The Court stated, "We conclude, therefore, that the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection and that appellant Bigelow had no legitimate First Amendment interest. We need not decide in this

[5] "It is established that product advertising is less vigorously protected than other forms of speech. *Breard v City of Alexandria*, 341 U.S. 622, 642, 71 S.Ct. 920, 95 L.Ed. 1233 (1951); *Murdock v Com. of Pennsylvania*, 319 U.S. 105, 110-111, 63 S.Ct. 920, 87 L.Ed. 1292 (1943); *Valentine v Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942); *Banzhaf v Federal Communications Commission*, 132 U.S. App. D.C. 14, 405 F.2d 1082, 1101 (1968) cert. denied, 396 U.S. 842, 90 S.Ct. 50, 24 L.Ed. 2d 93 (1969)." *Capital Broadcasting Company v Mitchell*, 333 F.Supp. 582, 584 (D.D.C. 1971).

case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit." 421 U.S. at 825. In determining that commercial speech was entitled to some measure of protection, the Court stated that they "may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation. The diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees." 421 U.S. at 826.

In the next term, the Supreme Court, in *Virginia Pharmacy Board v Virginia Consumer Council*, 425 U.S. 748, 770 (1976), discussed the correct posture of advertising within the protections of the first amendment. "In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible."[6]

The analysis of this Court's commercial speech decisions

[6] The Court went on to state:

> There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place, and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information. • • •.
>
> Nor is there any claim that prescription drug price advertisements are forbidden because they are false or misleading in any way. Untruthful speech, commercial or otherwise, has never been protected for its own sake. • • •.
>
> Also, there is no claim that the transactions proposed in the forbidden advertisements are themselves illegal in any way. • • •. Finally, the special problems of the electronic broadcast medium are likewise not in this case. • • •.

425 U.S. at 771-73.

is applicable to nude barroom dancing. The regulation would not prohibit the advertisement of the dancers or any communicative message they may have through their movement, nor would it prohibit the Lounge from securing a profit through the sale of beverages to its patrons. It would simply require the dancers to provide the enticement to patrons to buy drinks attired in a bare minimum of clothing measuring no more than four square inches over various parts of the body.

Finally, the contexts in which the Supreme Court has discussed commercial speech have generally involved cases in which the commercial speech to be regulated was advertising that was directed not only at soliciting business, but it generally provided an underlyingsubstantive message or professional service. In the case of nude dancing there is no message that is being provided that will benefit society. The advertisements for medicine or legal services may be of vital interest to many consumers. The nude dancers' enticement not only does not provide beneficial information to society, it may, in fact, provide material that is offensive and harmful to many.

III. CONCLUSION

Nude barroom dancing of the variety that is the subject of this case is not communicative expression. It is purely conduct. The sole motivation underlying the performances is to titillate the patrons and to entice them to purchase the house-provided beverages.

Any speech aspects of the performances are purely commercial. Consequently, the State's ability to regulate such speech aspects is enhanced. The State is well within its authority to require that while the women are enticing patrons to purchase the house-provided beverages they must comply with the statutory requirements of minimal clothing.

A State's ability to require certain levels of decency in public is inherent in its ability to effectively govern. The lack of such standards, either in dress or behavior, will result in a lack of recognition of the authority of the State itself.

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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